

DAVIS GRAHAM & STUBBS

July 25, 2017

Via E-Mail and U.S. Mail

Joshua Wirschafter, Esq.
U.S. EPA, Region IX
Office of Regional Counsel ORC-3
75 Hawthorne Street
San Francisco, CA 94105

Re: Leviathan Mine Superfund Site SSID 091A and 09PU
Response to Request for Payment of EPA Costs, dated June 19, 2017

Dear Josh:

Atlantic Richfield Company received the above-referenced EPA request for payment by certified mail on June 28, 2017. The request was made under paragraph 79 of the Administrative Settlement Agreement and Order on Consent for Removal Action, CERCLA Docket No. 2008-29(b) (the "AOC"). EPA seeks payment of \$1,724,104.21 for "Settled Future Response Costs" (as defined in paragraph 7.i.iv of the AOC) purportedly incurred during the two-year period running from July 1, 2014 through June 30, 2016, plus some prior costs not included in EPA's previous bill. The request includes costs incurred by EPA for oversight of response actions required under both the AOC and the Administrative Order for Remedial Investigation and Feasibility Study, CERCLA Docket No. 2008-18 (the "UAO"). EPA included supporting documentation pertaining to support services provided by the United States Army Corps of Engineers ("USACE") under IAG Number DW96957675. We also received limited documentation of contract costs paid to the US Department of Health & Human Services (ATSDR), ICF Inc., the U.S. Government Printing Office, Toeroek-Herndon, and the Washoe Tribe. However, other supporting documents were not provided, including time sheets, vouchers, contractor and subcontractor invoices, progress reports, etc.

Under the AOC (paragraph 79.c), Atlantic Richfield may dispute all or part of a bill for Settled Future Response Costs if it alleges that: (a) EPA has made an accounting error; (b) there is a reasonable basis for objecting to the identification of any cost item as either an 09PU Cost or an 091A Cost; or (c) a cost item was incurred inconsistent with the NCP. The AOC provides a process and a schedule for Atlantic Richfield to notify EPA of any such dispute and for resolving the dispute through negotiation. Under Paragraph 87 of the AOC Atlantic Richfield also may request additional documentation to evaluate an EPA bill. EPA is to provide supporting documents in its possession in response to such a request.

DISPUTED COSTS

EPA Payroll and Travel Costs

EPA's oversight at Leviathan continues to be excessive. Between the four Site ID's, total Regional and Headquarters payroll and travel costs just during the two-year period covered by this payment request are approximately \$800,000 (including indirect costs). Payroll summaries for 2014 through 2016 list no less than thirty-one different EPA employees charging a combined 6,394 hours to this project, including environmental protection specialists, attorneys, environmental engineers, chemists, environmental scientists, accountants, supervisors, analysts, and toxicologists. This doesn't even include EPA's contractors and sub-contractors. Many names are unrecognizable to Atlantic Richfield, and there is no documentation of what some of these people did or how their work relates to the performance of CERCLA response actions at the Leviathan site. This is a PRP-lead site, involving highly qualified and experienced consultants, who continue to perform the removal action and RI/FS in accordance with the legal requirements of the 2008 AOC and 2009 UAO at a tremendous cost to Atlantic Richfield. Atlantic Richfield should not also have to pay for duplicative, unnecessary, or inefficient EPA oversight.

Although objectionable Atlantic Richfield will not formally dispute any of the EPA Payroll and Travel Costs in the current payment request, with one exception: the Regional Payroll Cost summary for Site ID 091A includes 196 hours for "Bruck, Glenn, Environmental Scientist" in 2015 and 2016, with billed costs totaling \$23,484.26. Of this amount, \$11,742.13 (50%) is being charged to Atlantic Richfield. The Activity Code Description for Mr. Bruck's time entries is listed as "Negotiation/Generic." Mr. Bruck, formerly a hydrogeologist employed by EPA (now retired), did not contribute in a material way to the RI/FS. With the USACE already accounting for over \$900,000 in 091A costs for technical oversight during the same period (as discussed below), it is unreasonable and duplicative, and therefore inconsistent with the NCP, to also include charges for Mr. Bruck's time.

- *Atlantic Richfield disputes and will withhold payment for \$11,742.13 in payroll and indirect costs billed under Site ID 091A for Mr. Bruck's time.*

ATSDR Costs

EPA's payment request includes \$20,184.67 in contract costs under Site ID 091A for services provided by the U.S. Department of Health & Human Services, Agency for Toxic Substances and Disease Registry ("ATSDR"). Of this amount, \$10,092.33 (50%) is being charged to Atlantic Richfield. It does not appear from the cost summaries that any indirect costs were applied to this charge. The Voucher Report for this item (Section 5 of the Cost Summary Report) describes the services provided as: "File review and response to a Public Records Act request." Atlantic Richfield should not be paying for ATSDR to respond a Public Records Act

request. There is also an October 6, 2016 letter from ATSDR to EPA and an August 18, 2016 letter from the California Department of Public Health (“CDPH”) to ATSDR in the documentation package addressing these costs. The CDPH letter states that “[s]taff worked approximately 324 hours in 2015-16 conducting health education and community outreach activities,” resulting in total expenditures for the period of \$20,184. Atlantic Richfield is not aware of any EPA-directed work by CDPH or ATSDR during this time. EPA has been conducting its own site-related community outreach, as evidenced by the substantial time billed by Yolanda Sanchez on the project: 259.25 payroll hours during FY 2015 and 2016. It is unclear what necessary function the additional outreach performed by CDPH would have served. In any event, ATSDR or CDPH costs for performing health education and community outreach do not fall within the definition of Future Response Costs in Paragraph 7.i of the AOC.

- *Atlantic Richfield disputes and will withhold payment for \$10,092.33 in ATSDR contract costs billed under Site ID 091A.*

Washoe Tribe Costs

EPA’s payment request includes \$176,822.06 in contract costs under Site ID 091A for work invoiced by the Washoe Tribe under a State Cooperative Agreement. Of this amount, \$88,411.03 (50%) is being charged to Atlantic Richfield. Other than a Drawdown Summary Table and a set of Grant Payment Reports, EPA has provided no supporting documentation for these costs. Based on the limited documentation provided, we cannot thoroughly assess the basis for the Tribe’s costs, whether they were incurred inconsistent with the NCP, whether the requirements pertaining to cooperative agreements for CERCLA response actions under 40 CFR Subpart O have been satisfied, and therefore whether the Washoe Tribe’s costs constitute legitimate Settled Future Response Costs under the AOC. Without more information, Atlantic Richfield cannot determine which Washoe costs should be disputed and which paid as uncontested. At a minimum, we request that EPA provide copies of: (i) the Washoe Tribe’s quarterly progress reports describing the site-related activities performed; and (ii) contractor and subcontractor vouchers, drawdowns, invoices, payroll reports or time sheets, and other documentation of work performed and costs incurred. NCP compliance requires that such documentation be maintained.

Once these supporting documents are provided, Atlantic Richfield can make a reasoned determination as to which billed cost items should be disputed and which paid as uncontested. Until then, Atlantic Richfield questions all Washoe Tribe charges identified in EPA’s payment request and expressly reserves all rights and defenses that may be available to it regarding these charges.

- *Atlantic Richfield disputes and will withhold payment for \$88,411.03 in Washoe Tribe contract costs billed under Site ID 091A.*

USACE Costs

EPA's payment request includes a combined total of \$1,983,101.98 in contract costs for work invoiced by the USACE. Of this amount, \$1,137,039.18 is being charged to Atlantic Richfield. As we have stated in prior payment request responses, the amount of oversight activity performed by the USACE and its sub-contractor Burleson Consulting Inc., is disproportionately high. This is especially true given the excessive oversight time spent by EPA personnel on this matter (as described above). The result is costs inconsistent with the NCP.

091A and 09PU(Not BB) Costs

USACE costs for Site ID's 091A and 09PU(Not BB) total \$1,656,450.47, of which \$828,225.24 is being charged to Atlantic Richfield. This, presumably, is for oversight of Atlantic Richfield's RI/FS work, although the lack of adequate documentation leaves this unclear. While excessive, Atlantic Richfield is not formally disputing these costs.

09PU-BB Costs

USACE costs for Site ID 09PB-BB total \$308,813.94, all of which is being charged to Atlantic Richfield. This is for oversight of removal action "Work" required under the AOC, which basically means operation and maintenance of the HDS and Aspen Seep Bioreactor treatment systems. By comparison, the USACE's charges for oversight of the Water Board's treatment system operations during the same period (Site ID 09PV) were only \$17,837.57. There has been little or no change to the HDS and Aspen Seep Bioreactor equipment and water treatment procedures in the past several years. There is no rational basis for the USACE spending 17 times more effort and money on oversight of Atlantic Richfield's treatment activities as compared to the Water Board's.

There are also multiple discrepancies in the supporting documentation for Site ID 09PU-BB, suggesting that costs have been misidentified. For example:

Voucher 52092533. \$8224.30 was charged to 09PU-BB. The only task noted in Burleson's September 2013 Monthly Status Report related to oversight of AOC-related Work is: "reviewed the Atlantic Richfield LAS request," which consisted of a simple three-page letter. Burleson's review should not have cost over \$8,000.

Voucher 52095960. \$5,172.12 was charged to 09PU-BB. There is no mention in Burleson's June 2014 Monthly Status Report of any oversight of AOC-related Work. No 09PU-BB charges should have accrued.

Voucher 52096826. \$3,846.39 was charged to 09PU-BB. There is no mention in Burleson's August 2014 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52098267. \$2,925.36 was charged to 09PU-BB. There is no mention in Burleson's December 2014 Monthly Status Report of any oversight of AOC-related Work (which makes sense since very little Work occurs at the site in December). No 09PU-BB charges should have accrued.

Voucher 52098956. \$2,110.03 was charged to 09PU-BB. There is no mention in Burleson's February 2015 Monthly Status Report of any oversight of AOC-related Work. On the other hand, the Report states that Burleson "[r]eviewed the Regional Board 2014 early response action completion report." Yet no USACE costs were charged to Site ID 09PV for this month/voucher. Charges thus appear to have been misidentified. No 09PU-BB charges should have accrued.

Voucher 52099760. \$6,860.39 was charged to 09PU-BB. There is no mention in Burleson's April 2014 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 5210581. \$9,240.58 was charged to 09PU-BB. There is no mention in Burleson's June 2015 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52101026. \$13,575.09 was charged to 09PU-BB. Burleson's July 2015 Monthly Status Report refers to "two ERA Site Status Reports documenting the July 15 and July 27 ERA oversight visits." The Water Board commenced treatment using the Pond 1 System on July 15, 2015. Yet no USACE costs were charged to Site ID 09PV for this month/voucher. At least a portion of the 09PU-BB charges thus appear to be misidentified.

Voucher 52101455. \$3,612.98 was charged to 09PU-BB. There is no mention in Burleson's August 2015 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52102404. \$3,689.81 was charged to 09PU-BB. There is no mention in Burleson's October 2015 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52103113. \$7,906.46 was charged to 09PU-BB. There is no mention in Burleson's December 2015 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52103873. \$8,039.11 was charged to 09PU-BB. There is no mention in Burleson's February 2016 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Voucher 52104318. \$5,087.23 was charged to 09PU-BB. There is no mention in Burleson's March 2016 Monthly Status Report of any oversight of AOC-related Work. No 09PB-BB charges should have accrued.

Besides these specific billing items, EPA's supporting documentation fails to show how monthly USACE and Burleson costs were determined (no labor detail is provided) and allocated among the Site IDs. Without that information, Atlantic Richfield cannot determine whether the costs were correctly identified or if they were reasonable and necessary, and thus consistent with the NCP.

- *The combined charges for the vouchers listed above are \$80,289.85, which represents approximately 25% of the total 09PU-BB costs charged to Atlantic Richfield. Based on the discrepancies detailed above and Atlantic Richfield's ongoing concerns over the excessive level and cost of USACE's and Burleson's oversight, Atlantic Richfield disputes and will withhold this amount from its payment for 09PU-BB charges.*

Summary

Atlantic Richfield is notifying EPA of its objections to \$190,535.34 of the total \$1,724,104.21 in EPA's payment request. Atlantic Richfield disputes: (i) \$11,742.13 in EPA Payroll Costs and Travel Costs because the associated oversight work (by Glenn Bruck) was duplicative, unnecessary, and inconsistent with the NCP; (ii) \$10,092.33 in ATSDR Contract Costs because CDPH's work duplicated EPA community outreach, and the charges do not fall within the definition of Future Response Costs in Paragraph 7.i of the AOC; (iii) \$88,411.03 in Washoe Tribe Contract Costs because supporting documentation sufficient for cost recovery has not been provided; and (iv) \$80,289.85 in USACE/Burleson contract costs because of discrepancies in the Burleson Monthly Status Reports, misidentification of the associated charges, and a general lack of adequate documentation. If the requested documents are provided, Atlantic Richfield will reconsider the Washoe Tribe's portion of the disputed costs.

In accordance with Paragraph 79 of the AOC, Atlantic Richfield will tender payment to EPA of \$1,533,568.87 by August 27, 2017. This amount fully satisfies Atlantic Richfield payment obligations as to the associated charges. Within the same period, Atlantic Richfield will deposit \$190,535.34 into an interest-bearing escrow account maintained by U.S. Bank.

In addition to any objections or qualifying statements noted above, Atlantic Richfield expressly reserves all rights and defenses, including all rights conferred under the AOC, regarding these disputed charges and any other response costs allegedly incurred by EPA and not

Joshua Wirtschafter, Esq.
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included in the payment request. If negotiations to resolve this dispute are not successful, Atlantic Richfield also reserves the right to assert additional or different positions than those stated in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'A.S. Cohen', with a long horizontal flourish extending to the right.

Adam S. Cohen

for

Davis Graham & Stubbs LLP

cc: Anthony Brown
Ronald Halsey
Brian Johnson
Nathan Block, Esq.